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Supreme Court of the United States

October Term, 1974

No. 74-1025

BURTICE A. HINES, *et al.*,
Petitioners,

vs.

ANCHOR MOTOR FREIGHT, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 506 F.2d 1153 and is printed in the appendix to the Petition for Certiorari, at p. A9. The opinion of the District Court is unofficially reported as *Hines v. Local Union No. 377, et al.*, 72 LC ¶13,987 (N.D. Ohio 1973) and is printed in the appendix to the Petition, at p. A1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1974. The Petition for Certiorari was filed on February 15, 1975 and granted on April 21, 1975. Jurisdiction to review this judgment by writ of certiorari is conferred on this Court by Title 28, United States Code, Section 1257(3).

STATUTORY PROVISION INVOLVED

Labor-Management Relations Act §301 (29 U.S.C. §185):

Suits by and against labor organizations—Venue, amount and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter, and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the

organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, §301 61 Stat. 156.

QUESTION PRESENTED

Whether petitioners' claim under LMRA §301 for wrongful discharge is barred by the decision of a joint grievance committee upholding their discharge, notwithstanding that their union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of overwhelming evidence of their innocence of the alleged dishonesty for which they were discharged?

STATEMENT OF THE CASE

Petitioners, eight truck drivers discharged from their jobs by the respondent Anchor Motor Freight Company, seek to have this Court reverse a divided decision of the Court of Appeals for the Sixth Circuit entered on November 22, 1974, affirming a summary judgment granted by the District Court in favor of respondent Anchor Motor Freight in petitioners' action for wrongful discharge and breach of the duty of fair representation. (The Court of Appeals reversed the District Court's grant of summary judgment to Teamsters Local Union No. 377 and no cross petition has been filed by the Union.)

The relevant facts are set forth below as they pertain to wrongful discharge, unfair representation and the proceedings below respectively.

A. Wrongful Discharge

On June 5, 1967, the eight petitioners and three others were discharged from their employment as truck drivers for Anchor Motor Freight for alleged dishonesty (R. 119-120).[1] Petitioners contend that by this discharge, Anchor

[1] "R" refers to the page number of items reprinted in the Appendix. The opinions below which are reprinted in the Appendix to the Petition will be cited as "A".

Motor Freight breached its collective bargaining agreement with petitioners' union, Local 377 of the International Brotherhood of Teamsters, by which Anchor agreed that:

> "The Employer shall not discharge or suspend any employees without just cause. . . ." (Art. 32, National Master Automobile Transporters Agreement, R. 170-171).

The alleged dishonesty consisted of claims that petitioners had submitted motel receipts to the Company for reimbursement for higher amounts than they had actually paid (R. 121). The evidence upon which Anchor relied (R. 122-123, 129) which it submitted to subsequent grievance proceedings (R. 137-138) and to the District Court consisted of receipts showing amounts paid in excess of amounts shown paid on the comparable motel registration cards (R. 173-179), accompanying logs and expense summaries, the notarized statement of motel clerk Anthony Pagano swearing to the accuracy of the amounts shown on the registration cards (R. 180-186) and the notarized statements of motel owner Joseph Repicci swearing to the accuracy of the amounts shown on the registration cards and to the fact that inflated receipts were given to petitioners (R. 188-189).

Petitioners' evidence in the District Court on this issue consisted of (1) the fact that they have at all times denied paying less than was shown on the receipts they submitted (R. 106, 87, 75, 47); (2) owner Repicci's deposition testimony that he personally handled none of the transactions in question (R. 65), that his brother-in-law Pagano had handled them, having authority to sign his name (R. 65), that he (Repicci) had no personal knowledge of the transactions (R. 66) and that his notarized statements (R. 188-189) had been based solely on comparison of the receipts with the registration cards and his brother-in-law's word

(R. 66-67); and (3) *Clerk Pagano's Deposition Testimony that he handled all of the transactions in question (R. 51-53), that the amounts shown on the receipts accurately reflect what petitioners paid and that the discrepancy between the receipts and the registration cards is attributable to his having recorded a lesser amount on the registration card and pocketed the difference (R. 53-54), that he committed perjury when he swore to the notarized statement obtained by Anchor (R. 55), and that, of his own volition, he apprised Anchor officials of these facts in 1968 (R. 55-59).*

Thus, there is no evidence of petitioners' dishonesty that survives Pagano's admission of culpability, and the evidence overwhelmingly establishes petitioners' innocence, and, therefore, their discharge is "without just cause" in violation of the collective bargaining agreement.

B. Unfair Representation

1. Local 377 processed petitioners' grievance in an "arbitrary" and "perfunctory" fashion.

On the day petitioners were discharged, June 5, 1967, grievance proceedings were had at the local level, at which Anchor's evidence of petitioners' alleged dishonesty (R. 173-189) was presented to Local 377 Business Agent, Abe Schwartz[2] (R. 122-123, 104). The informal meeting between company and union officials culminated in an agreement that the men would be reinstated pending submission of the dispute to the Joint Arbitration Committee in Detroit (R. 133) which proceedings were subsequently scheduled for July 26, 1967 (R. 190).

In the interim, petitioners advised their union repre-

[2] One of two business agents assigned by Local Union 377 to "service" the employees at Anchor's Lordstown terminal. The other was John Angelo (R. 101).

sentatives, Angelo and Schwartz, of their innocence (R. 87, 102), solicited their assistance and advice in preparing for the hearing in Detroit (R. 46, 40-41, 73-74, 79-80), and specifically suggested investigating the motel, contacting the motel owner, and obtaining or consulting a lawyer (R. 40-41, 49, 73-74). *Notwithstanding the substantial evidence presented by the Company at the local meeting, Angelo and Schwartz advised petitioners that they had nothing to worry about (R. 46, 79-80), that there was no way the Company could fire them and that there was no need for them to investigate or do anything (R. 40-41, 73-74). Plaintiffs were specifically advised to forget it (R. 49), to do nothing (R. 49), and to let Angelo take care of it (R. 46, 79).*

Petitioners heeded Angelo and Schwartz as "advice of knowing what was going on" (R. 80, 40). Prior to going to Detroit for the hearing, Angelo and Schwartz conducted no investigation, gathered no evidence, gave petitioners no advice of their procedural rights and engaged in no preparation other than telling the men to be there and state their case (R. 39, 49, 87-88, 104-105, 106-108).

At the hearing in Detroit, Angelo and Schwartz presented not a shred of evidence (R. 30-31, 47, 139-140), responding to the Company's evidence (R. 173-189) with nothing more than raw assertion of the petitioners' innocence and wholly unsupported charges against the motel (R. 135-136, 139-140). Each of the petitioners present was given the opportunity to assert his innocence as well (R. 137).

After the panel upheld the discharge,[3] petitioners privately retained an attorney (R. 48, 82) who went to the motel and obtained a sworn statement from owner Repicci (R. 82-83) indicating that he had no personal knowledge

[3] An unsurprising result in light of the evidence presented. Even union representatives on the panel voted against petitioners (R. 142).

of the transactions in question, that his clerk had handled them, and that the discrepancy between the receipts and registration cards could just as likely be attributable to the clerk recording less than was actually paid (R. 199-209).

Armed with this statement, some of the petitioners returned to Detroit in October (accompanied by their attorney, Angelo, and Schwartz) to seek a rehearing from the panel based on the new evidence (R. 48). However, the requests for rehearing were unanimously denied on the ground that there was no new evidence justifying a reopening (R. 210-212) and the motel owner's statement was never considered by the grievance committee on the merits of the discharge.

2. *Local 377 officials were motivated by ill will and animosity toward petitioners generated by labor relations conflicts occurring prior to the discharge.*

When Anchor Motor Freight opened its Lordstown Terminal in 1966, the Company was compelled by contract to rehire laid-off drivers from Norwood, Ohio, who came to Lordstown with seniority and entitlement to higher fringe benefits (R. 110-112). The Norwood drivers were unhappy with the less favorable dispatch system and work rules at Lordstown (R. 77-78, 116-117), pursuant to a local rider negotiated by Anchor with Teamsters Local 964 prior to the arrival of any employees and only a week or two before Local 377 assumed jurisdiction as collective bargaining agent (R. 112-114, 115). Complaints about the local rider and about the lack of opportunity to vote on its ratification produced only claims of being helplessly bound by it from Local 377 (R. 84-86).

Further, the drivers complained about a general failure of representation from Local 377 (R. 50), including the failure to provide a steward and committee from the

opening of the terminal in April 1966 to a stormy union meeting in August of that year when John Angelo appointed a steward over the vehement objections of the men, who had elected their own at Norwood and wanted to do so at Lordstown (R. 33-34). Only under threat of walkout did Angelo permit the men to elect a committee (R. 79). During the course of the meeting, Angelo denounced the Norwood drivers as "hillbillies" and declared that they weren't going to take over his union (R. 152).

The drivers' discontent with the local rider working conditions and with the representation provided by Local 377 continued into February 1967, when they took matters into their own hands and went out on a wildcat strike (R. 34-36, 50). Among the leaders of the wildcat strike were petitioners Worley and Croft (R. 156-161).

During this period of driver discontent with working conditions at Lordstown and even greater unhappiness with the quality and vigor of representation being provided by Angelo and Schwartz, the two business agents for Local 377 were receiving favors from the Company. Terminal Manager Eugene Babiasz loaned a Company car to John Angelo (R. 91-97) and arranged a personal automobile purchase bargain for him in Michigan (R. 97-98). Jobs were given to at least two of Abe Schwartz' relatives (A6). Meanwhile the Company was weeding out its Norwood drivers, twenty-five of the fifty-seven who had transferred to Lordstown having been terminated or quit by the end of 1967, including five of the eleven discharged for the alleged dishonesty in issue in the instant case (R. 164-168).[4]

C. Proceedings Below

This action by eight of the eleven discharged drivers was filed on June 30, 1969 in the Northern District of Ohio,

[4] The Company had previously, but unsuccessfully, sought to discharge petitioner Worley (R. 47-48).

Eastern Division (R. 4). On September 25, 1973, under dubious procedural circumstances,[5] the District Court granted summary judgment to all respondents on the ground that the decision of the joint grievance committee upholding the discharges was final and binding absent a breach of the duty of fair representation by the union of which there was insufficient evidence to warrant a trial (A1-8).

On appeal to the Sixth Circuit, the Court of Appeals unanimously reversed the judgment in favor of Local Union No. 377, concluding that there was indeed sufficient evidence of a breach of the duty of fair representation to warrant a trial, but nevertheless affirmed by divided vote the summary judgment in favor of Anchor Motor Freight, holding that the joint grievance committee's decision was

[5] On June 1, 1972, Anchor Motor Freight filed a motion for summary judgment (R. 16) based on the identical evidence and law subsequently asserted in support of its second and successful motion filed a year later. (Both union respondents expressly opted not to file summary judgment motions within the deadlines established and extended by the District Court.) On October 31, 1972 district Judge Leroy Contie overruled Anchor's first motion for summary judgment finding "substantial issues as to material facts" (R. 17).

Although Anchor's subsequent motion for continuance until after January 1, 1974 was overruled (R. 18), the case was never called for trial, notwithstanding that it was set for trial six times between September 11, 1972 and September 24, 1973.

One year after its first motion, Anchor filed another motion for summary judgment (R. 19) based on the identical evidence and legal theories which it had urged in support of its previous motion (R. 16) which had been overruled by the Court (R. 17). This time the union respondents filed a motion for summary judgment as well (R. 20) based, however, on the same evidence and legal contentions (plus a contention by the respondent International Brotherhood of Teamsters that even assuming a wrongful discharge, and breach of the duty of fair representation by Local 377, the International was not liable therefor). The district judge, brushing aside petitioners' objections to the refiling of the identical motion previously overruled (R. 22) and to the filing by the union respondents an entire year out of rule, reversed himself and granted summary judgment to all respondents (A1-8).

final and binding in favor of the employer notwithstanding that the union breached its duty of fair representation in processing the grievance (A15-16). The Court affirmed the judgment in favor of the International Union, implicitly holding that the International could not be vicariously liable for the torts of its Local (A15), an issue which the District Court had found it unnecessary to resolve.

On April 21, 1975 this Court granted petitioners' Petition for Certiorari to review the judgment of the Sixth Circuit affirming the summary judgment awarded to their employer Anchor Motor Freight, Inc., by the District Court, to determine the question presented thereby, to wit:

> Whether petitioners' claim under LMRA §301 for wrongful discharge is barred by the decision of a joint grievance committee upholding their discharge, notwithstanding that their union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of overwhelming evidence of their innocence of the alleged dishonesty for which they were discharged?

SUMMARY OF ARGUMENT

I.

The holding of the Sixth Circuit below, that petitioners' §301 action for wrongful discharge is barred by a joint grievance committee proceeding in which they were deprived of fair representation, flies in the face of the spirit of this Court's decision in *Vaca v. Sipes,* 386 U.S. 171 (1967) and of the overwhelming weight of authority in the lower courts since *Vaca*.

The Court declared in *Vaca* that it would be "a great injustice" to leave an employee remediless where "the employer has committed a wrongful discharge in breach of [the collective bargaining] agreement, a breach which

could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee." 386 U.S. at 185-186. Although *Vaca* involved the refusal of a union to process the plaintiff's grievance to conclusion, both the letter and the logic of the Court's opinion apply equally to grievances processed to conclusion in breach of the duty of fair representation, as the Court further declared, "that a union may not arbitrarily ignore a meritorious grievance *or process it in perfunctory fashion. . . .*" *Id.* at 191 (emphasis added).

Every circuit court of appeals that has considered the issue (except for the Sixth Circuit in the instant case) has concluded that a grievance proceeding in which an employee has been deprived of fair representation cannot bar his §301 action against the employer. *Steinman v. Spector Freight System, Inc.*, 441 F.2d 599 (2d Cir. 1971); *Butler v. Local Union 823, International Brotherhood of Teamsters*, ___ F.2d ___, 76 LC ¶10,739 (8th Cir. 3/18/75); *Margetta v. Pam Pam Corporation*, 501 F.2d 179 (9th Cir. 1974); *Bieski v. Eastern Automobile Forwarding Co.*, 396 F.2d 32, 38 (3d Cir. 1968) (dicta); *Lusk v. Eastern Products Corp.*, 427 F.2d 705 (4th Cir. 1970) (dicta); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971) (dicta); *Szczesny v. Montgomery Ward & Co.*, 83 L.R.R.M. 2041 (7th Cir. 1973) (dicta).

II.

It is fundamentally unfair to bind employees to the results of grievance proceedings in which their grievances are not fairly presented. Grievances which are not fairly presented cannot be fairly considered. Thus, in the instant case, the union's breach of fair representation deprived both petitioners and the grievance committee of

overwhelming evidence of innocence thereby undermining the reliability of the fact finding process.

Relief against the union alone is insufficient to make petitioners whole, since reinstatement cannot be awarded against the union. Nor may damages for loss of employment be recovered from the union except to the extent that it "added to the difficulty and expense of collecting from the employer," *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970), which damages are arguably nothing since nothing can be collected from the employer. Thus, unless this Court reverses the summary judgment affirmed in favor of their employer, Anchor Motor Freight, petitioners will have suffered the "great injustice" of two wrongs without a remedy.

III.

The application of the principles articulated in *Vaca v. Sipes, supra*, to grievances unfairly processed to conclusion is required by national labor policy. Although that policy since the 1930's has sought to promote industrial peace and justice by enhancing the collective power of employees through labor unions in order to balance the power of employers and facilitate a system of "industrial self-government," *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), both Congress and this Court have recognized the necessity of providing some measure of judicial protection for individual employees from abuses of the awesome power vested by law in the contracting parties. Accordingly unions have been held to a duty of fair representation, *Steele v. Louisville L. & N. R. Co.*, 323 U.S. 192 (1944); *Vaca v. Sipes, supra*, and individual employees have been accorded the right to file suit for breaches of collective bargaining agreements pursuant to §301 of the Labor-Management Rela-

tions Act, 29 U.S.C. §185, *Smith v. Evening News Ass'n,* 371 U.S. 195 (1962).

To protect and preserve the fundamental principle of this Court's decisions in the "Steelworkers Trilogy" of reliance upon industrial grievance procedures as "substitute|s| for industrial strife," 363 U.S. at 578, it is imperative that unfairly represented employees be permitted to pursue their §301 action against their employer.

Although "rigged," "collusive," "agreed," or "horse-traded cases" are widely reported, collusion is virtually impossible to prove. Thus, the breach of contract/duty of fair representation law suit represents the only significant check against those breaches of the integrity of contractual grievance procedures detrimental to individual employees "stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes, supra,* at 182. To immunize industrial grievance procedures from even this minimal form of review is to invite abuses of integrity such as will undermine the ability of such procedures to function as "substitutes for industrial strife."

IV.

Even if this Court is not inclined at this time to adopt the per se rule suggested by *Vaca v. Sipes, i.e.* that proof of unfair representation in the processing of his grievance entitles an employee to litigate his §301 claim in all cases, a balance of the relevant labor policy interests involved in the instant case dictates such a rule for cases of this type.

Petitioners' discharge for dishonesty inflicted upon them the maximum harm that can befall a worker. Discharge grievances involve maximum risk of collusion and unfair representation. Judicial review of discharge grievances poses minimal risk to the "system of industrial self-

government" favored by "The Trilogy" since they tend to present only questions of fact and seldom involve or require contract interpretation, modification, or renegotiation.

The joint grievance committee procedure (comprising an equal number of employer and union representatives without any neutrals) which upheld petitioners' discharge, is inherently more susceptible to corruption than traditional arbitration and thus the need for some residuum of meaningful judicial scrutiny of its results is optimal.

There is overwhelming evidence of petitioners' innocence of the dishonesty for which they were discharged, the benefit of which both they and the grievance committee were deprived by reason of the union's arbitrary and bad faith breach of its duty of fair representation.

ARGUMENT

I. THE DECISION BELOW FLIES IN THE FACE OF THE SPIRIT OF THIS COURT'S DECISION IN *VACA V. SIPES,* 386 U.S. 171 (1967), AND THE OVERWHELMING WEIGHT OF AUTHORITY IN THE LOWER COURTS.

The majority below affirmed the summary judgment in favor of the respondent Anchor Motor Freight on petitioners' claim for wrongful discharge, on the ground that the decision of a joint grievance committee upholding the discharge barred their §301 action. It did so in spite of its finding that there was sufficient evidence, to warrant a trial, that respondent Local Union No. 377 had breached its duty of fair representation to petitioners in handling their grievance.

The resultant holding, that a joint grievance committee proceeding in which petitioners were not fairly represented bars their §301 action against the employer, flies in the face of the spirit of this Court's decision in *Vaca v.*

Sipes, 386 U.S. 171 (1967), and of the overwhelming weight of authority in the lower courts since *Vaca*.

In arriving at its decision in *Vaca* that fair representation duty suits were not pre-empted by the jurisdiction of the National Labor Relations Board, this Court found it necessary to consider the issue "in the context of many [anticipated] §301 breach-of-contract actions." 386 U.S. at 187. The Court, recognizing that because contractual grievance procedures "have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant," found it necessary "to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 386 U.S. at 185.

The Court concluded that it would be a great injustice to leave an employee remediless where "the employer has committed a wrongful discharge in breach of [the collective bargaining] agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee." 386 U.S. at 185-186. Mr. Justice White, speaking for the majority, explained:

> "We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. Cf. *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (C. A. 5th Cir.).

> "For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 186.

Although it is true that the particular facts of *Vaca v. Sipes* involved the refusal of the union to process the plaintiff's grievance to conclusion, both the letter and the logic of the Court's opinion apply equally to breaches of the duty of fair representation committed by the union in the course of processing the grievance.[6] Thus, in brief explanation of the duty of fair representation as applied to grievances, the Court said:

> ". . . that a union may not arbitrarily ignore a meritorious grievance *or process it in perfunctory fashion*. . ." *Id.* at 191 (emphasis added).

Indeed, any other rule would facilitate the easy evasion of the *Vaca* principle by the simple device of perfunctorily processing the grievance, thereby according the employee the form, but not the substance, of grievance proceedings.[7]

Accordingly, each circuit court of appeals that has considered the issue (except for the Sixth Circuit in the

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[6] The applicability of the principles underlying *Vaca* to grievances processed to conclusion had been recognized by this Court three years earlier in *Humphrey v. Moore*, 375 U.S. 335 (1964), where the Court suggested that proof of the plaintiff-employees' claim of dishonest union conduct in breach of the duty of fair representation would permit them to maintain a §301 action for breach of the collective bargaining agreement against their employer to enjoin enforcement of an otherwise final decision of a joint grievance committee on a seniority grievance, *id* at 342-343. The judgment in plaintiff's favor was reversed, however, on the ground that they had failed to prove such a breach.

[7] This is exactly what petitioners claim happened in the instant case. See Section IV *infra* at pp. 33-35.

instant case) has concluded that a grievance proceeding in which an employee has been deprived of fair representation cannot bar his §301 action against the employer. The Second,[9] Eighth,[9] and Ninth[10] Circuits have expressly so held, while the Third,[11] Fourth,[12] Fifth,[13] and Seventh[14] Circuits have indicated their accord in dicta.[15]

II. IT IS GROSSLY UNJUST TO BIND AN EMPLOYEE TO THE RESULT OF A GRIEVANCE PROCEEDING IN WHICH HE IS NOT FAIRLY REPRESENTED.

A. A Grievance Proceeding Without a Fair Presentation of the Grievance Is a Sham.

The fundamental injustice of binding an employee to the result of a grievance proceeding in which he was not fairly represented has been cogently articulated by the

[9] *Steinman v. Spector Freight System, Inc.*, 441 F.2d 599 (2d Cir. 1971).

[9] *Butler v. Local Union 823, International Brotherhood of Teamsters*, ———F.2d———, 76 LC ¶10,739 (8th Cir. 3/18/75), *petition for cert. filed sub nom. Yellow Freight System, Inc. v. Butler*, 43 U.S.L.W. 3615 (5/14/75) (No. 74-1434).

[10] *Margetta v. Pam Pam Corporation*, 501 F.2d 179 (9th Cir. 1974); *Local 13, International Longshoremen's and Warehousemen's Union v. Pacific Maritime Association*, 441 F.2d 1061 (9th Cir. 1971).

[11] *Bieski v. Eastern Automobile Forwarding Co.*, 396 F.2d 32, 38 (3d Cir. 1968); *Rothlein v. Armour & Co.*, 391 F.2d 574, 579-580 (3d Cir. 1968).

[12] *Lusk v. Eastern Products Corp.*, 427 F.2d 705, 708 (4th Cir. 1970).

[13] *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971).

[14] *Szczesny v. Montgomery Ward & Co.*, 83 L.R.R.M. 2041 (7th Cir. 1973).

[15] Similar, albeit nonunanimous, conclusions have been reached by the district courts. *See, Morton v. Anchor Motor Freight, Inc.*, ——— F. Supp.———, 76 L.C. ¶10,752 (S.D.N.Y. 3/11/75); *Holodnak v. Avco-Lycoming Division, Avco Corp.*, 381 F. Supp. 191, 199 (D. Conn. 1974), *aff'd in relevant part*, ———

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Second Circuit in rejecting such a decision by the district court in *Steinman v. Spector Freight System, Inc.* 441 F.2d 599, 603 (2d Cir. 1971):

> "We do not agree with [the district court's] analysis, since it places undue emphasis on the form of arbitration and ignores the realities of plaintiff's plight. He has been effectively denied a fair hearing on the merits of his claim in the arbitration process and has now been similarly denied one in the federal district court. We agree that under *Republic Steel* [*Corp. v. Maddox*, 379 U.S. 650 (1965)]—as well as under other decisions cited to us by Spector—plaintiff could not sue if he had lost in a fair arbitration. But that has not occurred and the case is therefore inapposite."[16]

This rationale for applying the reasoning of *Vaca* to grievances processed to conclusion without fair representation was most recently and succinctly restated in *Holodnak v. Avco-Lycoming Division, Avco Corp.*, 381 F. Supp. 191, 199 (D. Conn. 1974), *aff'd in relevant part* ... F.2d ..., 76 LC ¶10,676 (2d Cir. 2/18/75):

> "The reason is that the employee's grievance can hardly have been given due consideration by the arbitrator when it was not fairly presented by his representative union."

This reasoning is particularly apposite to the instant case in which petitioners were accorded the form without the substance of a grievance proceeding, the union's

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F.2d ———, 76 LC ¶10,676 (2d Cir. 2/18/75); *Chapman v. United Aircraft Corp.*, 329 F. Supp. 735 (E.D. Pa. 1971). *See also, Corso v. Local 153, U.A.W.*, 123 N.J. Super. 121, 301 A. 2d 773 (App. Div. 1973). *Contra: Allesandrini v. American Fed'n of Musicians*, 334 F. Supp. 1152 (S.D. N.Y. 1970); *Hill v. Aro Corp.*, 275 F. Supp. 482 (N.D Ohio 1967).

[16] The fact that on remand the district court held that the employer (not having been a party to the NLRB proceeding) was

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breach of fair representation[17] having undermined the reliability of the fact finding process by depriving both the petitioners and the tribunal of the benefit of the unequivocally exculpatory evidence of the motel clerk and owner.[18]

If, indeed, it would "be a great injustice" to leave a wrongfully discharged employee remediless where the discharge "could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation," *Vaca v. Sipes, supra,* at 185-186, why would it be any less an injustice to leave such employee remediless where the union leads him to certain (and erroneous) defeat by breaching its duty of fair representation in the presentation of his grievance? The result is identical. To endow the latter with legal sanctity would be the ultimate exaltation of form over substance, as the Ninth Circuit recognized in *Margetta v. Pam Pam Corp.*, 501 F.2d 179 (9th Cir. 1974) when it declared:

> "To us, it makes little difference whether the union subverts the arbitration by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation. The grievance procedure is nothing less than a 'sham' " *Id.* at 180.

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not bound by the NLRB finding of unfair representation and concluded (after de novo trial of the issue) that Steinman had been fairly represented, *Steinman v Spector Freight System, Inc.*, Civil No. 1968-341 (W.D. N.Y. Feb. 16, 1972), *aff'd* 476 F.2d 437 (2d Cir. 1973), in no way detracts from the holding of the Second Circuit at 441 F.2d 599 that a meritorious claim of unfair representation by the union entitles the plaintiff to litigate his wrongful discharge claim in a §301 action against his employer.

[17]See Statement of the Case at pp. 6-8 *supra*.

[18]See Statement of the Case at pp. 5-6 *supra*.

B. Relief Against The Union Alone Is Insufficient.

A second major reason for allowing employees such as petitioners, wrongfully discharged by their employer and unfairly represented by their union, to proceed against their employer in a §301 action is that relief against the union alone would not be sufficient to make them whole. As succinctly summarized by the Ninth Circuit in *Margetta v. Pam Pam, supra:*

> "The fundamental teaching of *Vaca* is that somewhere along the judicial trail, the employee is entitled to a fair hearing on her grievance and, if wrongfully discharged, a judgment for adequate compensation or other relief. To suggest that she may sue her union is no answer. Relief against the union would not restore her job with Pam Pam. As indicated in *Vaca,* in these circumstances, adequate relief may be obtained only by joining the union and the employer." 501 F.2d at 180-81.

The Ninth Circuit, of course, was referring to this Court's statement in *Vaca:*

> "Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." Cf. *Richardson v. Texas & N. O. R. Co.*, 242 F.2d 230, 235, 236 (C.A. 5th Cir.).
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> * * * * *
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> "The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in *Humphrey v. Moore, supra.*" *Vaca v. Sipes,* 386 U.S. at 186, 197.

Obviously, in the instant case, petitioners can be awarded neither reinstatement nor damages for loss of em-

ployment against their employer, respondent Anchor Motor Freight, if the summary judgment in favor of Anchor is permitted to stand. Moreover, this Court's decision in *Czosek v. O'Mara*, 397 U.S. 25 (1970) precludes the recovery of damages for loss of employment from the union[19] except to the extent that it "added to the difficulty and expense of collecting from the employer," 397 U.S. at 29, which damages are arguably nothing since nothing can be collected from the employer.

The *Czosek* rule on the allocation of damages combined with the judgment of the Sixth Circuit in the instant case produces a result whereby petitioners are utterly without remedy even though they were wrongfully discharged (being wholly innocent of the dishonesty with which they were charged) and even though they were deprived of the opportunity to prove their innocence by reason of their union's arbitrary and bad faith processing of their grievance in breach of the duty of fair representation. Thus unless this Court reverses the judgment of the Sixth Circuit in favor of the employer, Anchor Motor Freight, petitioners will have suffered the "great injustice" of two wrongs without a remedy.

III. THE APPLICATION OF *VACA* PRINCIPLES TO GRIEVANCES UNFAIRLY PROCESSED TO CONCLUSION IS REQUIRED BY NATIONAL LABOR POLICY.

A. Both Congress and This Court Have Recognized the Necessity of Providing Judicial Protection for Individual Employees From Abuses of the Power Vested By Law in Management and Labor Under Our System of Collective Bargaining.

National labor policy, since the 1930's, has sought to

[19] It goes without saying that reinstatement cannot be ordered against the union alone, since such relief can only be conferred by the employer.

promote industrial peace and justice by enhancing the collective power of employees through labor unions in order to counter the power of employers thereby facilitating a system of collective bargaining designed to resolve labor disputes by agreement rather than strife.[20] This collective bargaining system necessarily "subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. at 182.

In recent years innumerable observers of American labor relations have noted that this solution to the problems of the Thirties, balancing the power of big business with the power of big labor, has created some new problems, in that union power can and has been exercised with employer power against employees in disfavor.[21]

Indeed both Congress and this Court have perceived and responded to the phenomena of abuse of union power and of union-employer "agreement" prejudicial to their member-employees. Congressional investigations conducted in the late Fifties disclosed innumerable abuses, including extensive collusion between certain managements and unions,[22] culminating in the enactment of the Labor-

[20] These policies have been developed upon the foundation of the National Labor Relations Act, 49 Stat. 449 (1935), as amended by the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §151 et seq.

[21] *See e. g.* Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 TUL. L. REV. 325, 336-38 (1973); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1465-66, 1523-24 (1963); Simpson and Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179 (1973); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 NYU L. REV. 362 (1962); Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55, 58-68 (1972).

[22] See Report of Select Committee on Improper Activities in the Labor or Management Field (popularly known as the Mc-

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Management Reporting and Disclosure Act, 73 Stat. 519 (1959), 29 U.S.C. §401 et seq. During the course of floor debate on the LMRDA, one of the bill's co-sponsors, Senator Randolph, articulated a common concern, declaring:

> "... today we are faced, perhaps more than ever before, with a desire on the part of some of us to continue the dignity of the individual. On the other hand, we have bigness all about us—bigness in government, bigness in industry, bigness in labor. Bigness is a part of our American life. Yet I wish to see to it that the individual is not lost in the shuffle." Cong. Rec., 86th Cong. 1st Sess. Vol. 105, p. 6281 (April 20, 1959).

Congress had already manifested its concern that the individual not get "lost in the shuffle" with specific respect to the administration of collective bargaining agreements by conferring upon individual employees the right to take their grievances directly to their employer without the interference of their union, Section 9 (a) of the National Labor Relations Act, as amended, 29 U.S.C. §159(a), and sought to strengthen that right in the LMRDA by requiring unions to make available to their members copies of the collective bargaining agreement in effect, 29 U.S.C. §414.

This Court has acknowledged that "harmony of interest between the union and the individual employee cannot always be presumed," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n. 19 (1974), that the union and the employer may control contractual remedies so as to render them "unworkable for the individual grievant." *Vaca v. Sipes*, 386 U.S. at 854, and that thus the basic system of reliance upon a balance of economic power must be tempered by some measure of judicial protection for individual

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Clellan Committee), Senate Report 1417, p. 4, 85th Cong. 2d Sess. (1958). In fact evidence was specifically adduced before the McClellan Committee of collusion between Anchor Motor Freight and Teamster officials. See Transcript of Hearings of Select Committee, pp. 19309-19354 (July 7, 1959).

employees from abuses of the awesome power vested by law in the contracting parties. Accordingly, this Court has held unions to a duty to fairly represent their members, *Vaca v. Sipes, supra; Steele v. Louisville L. & N. R. Co.*, 323 U.S. 192 (1944), and has upheld the right of individual employees to file suit for breaches of collective bargaining agreements pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185, *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

B. Reversal of the Decision Below Is Essential to the Integrity of Industrial Grievance Procedures and to the Preservation of Those Procedures as "Substitute[s] for Industrial Strife."

Another compelling reason for this Court to permit the unfairly represented petitioners to pursue their §301 action against their employer is to protect and preserve the fundamental principle of this Court's decisions in the "Steelworkers Trilogy"[23] of reliance upon contractual grievance procedures as the primary means of resolving industrial disputes. In order for contractual grievance procedures to serve their appointed function as "substitute[s] for industrial strife,"[24] it is necessary to insure not only their integrity but also the appearance of their integrity[25] so that their results will be accepted by the losing as well as the winning participants.[26]

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[23] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[24] 363 U.S. at 578.

[25] Cf. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

[26] "The smooth functioning of the grievance machinery can lead to employee faith in the proper handling of industrial dis-

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Indeed, the occurrence of "rigged," "collusive," "agreed" or "horsetraded" cases is reported by virtually every informed observer of, and participant in, industrial grievance procedures.[27]

As this Court noted in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n. 19 (1974):

> ". . . harmony of interest between the union and the individual employee cannot always be presumed. . . ."

It is also widely acknowledged that such "collusion" is virtually impossible to prove.[28] Accordingly the breach of

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putes. When the grievance machinery breaks down either because of employer repudiation of the grievance process or because a union wrongfully refuses to press an employee's grievance, faith in the system diminishes, and employees, unsatisfied with internal solutions to disputes, seek external action. Usually, the two external remedies used are wildcat strikes and court action under the doctrine of the duty of fair representation. The latter is clearly the preferred alternative." Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U. L. REV. 1096, 1098-1099 (1974).

[27] See Atleson, *Disciplinary Discharges—Arbitration and NLRB Deference*, 20 BUF. L. REV. 355, 380 (1971); Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 TUL. L. REV. 325, 336 (1973); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1524 (1963); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 630 (1956); Epstein, *The Agreed Case: A Problem in Ethics*, 20 ARB. L.J. 41 (1965); FLEMING, THE LABOR ARBITRATION PROCESS, 166-198 (1967); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 18-22; Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union: Duty of Fair Representation*, 5 U. TOL. L. REV. 514, 542 (1974); WIRTZ, THE ARBITRATOR AND THE PARTIES, 17, 26-32 (McKelvey ed. 1958).

[28] See *Modern Motor Express, Inc.*, 149 NLRB 1507, 1512 (1964); Atleson, *supra*, n. 27, at 369, 381; Azoff, *supra*, n. 27, at 339; Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81, 98 (1967); Simpson and Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1204, 1228 (1973).

contract-duty of fair representation law suit represents the only significant check against breaches of the integrity of contractual grievance procedures detrimental to individual employees "stripped of traditional forms of redress by the provisions of federal labor law."[29]

However, the holding of the Sixth Circuit in the instant case, that employees given the form of a contractual grievance proceeding are bound by the result regardless of how unfairly their grievance may have been presented and how demonstrably innocent they may be, virtually immunizes such proceedings from judicial scrutiny. This total "hands off" doctrine[30] will inevitably breed such abuses in contractual grievance procedures as to undermine their ability to function as "substitutes for industrial strife."

Total "hands off" doctrines fly in the face of Lord Acton's famous dictum that ". . . absolute power tends to corrupt absolutely," and have not had a happy history where adopted as talismanic rules of law. Perhaps the best example of such disastrous judicial experience is in the area of prison conditions, where decades of a virtually absolute "hands off" policy[31] generated horrendous abuses culminating literally in the discovery of "buried bodies" and the declaration of one state's entire prison system as violative of the Eighth Amendment's prohibition against cruel and unusual punishment.[32]

Ultimately this Court recognized that even where substantial values were served by a fundamental "hands off"

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[29] *Vaca v. Sipes, supra*, at 182.

[30] Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1167 n. 178 (1973).

[31] See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[32] *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

policy, there must be some residual judicial check against abuses. *Procunier v. Martinez*, 416 U.S. 396, 404-406 (1974); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

The checking-safety valve function[33] of the very limited review[34] afforded by §301—fair representation actions—is essential to the integrity of contractual grievance procedures and to their preservation as "the very heart of the system of industrial self government."[35] Accordingly it is imperative that this Court reject the per se rule adopted by the Sixth Circuit in binding petitioners to the result of a grievance proceeding in which they were not fairly represented.

IV. ANALYSIS OF THE RELEVANT LABOR POLICY INTERESTS INVOLVED IN THE INSTANT CASE DICTATE REVERSAL OF THE SUMMARY JUDGMENT AWARDED TO THE EMPLOYER.

Even if this Court is not inclined at this time to adopt the per se rule suggested by *Vaca v. Sipes*, i.e. that proof of unfair representation in the processing of his grievance entitles an employee to litigate his §301 claim in all cases, a balance of relevant labor policy interests involved in this case dictates such a rule for cases of the instant type.

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[33] "Employees who seek legal remedies must have faith in the manner in which the court arrives at its conclusion; otherwise, employees will refuse to seek court action and will resolve their disputes through industrial disturbances. The doctrine of the duty of fair representation can provide aggrieved employees with the opportunity to adjudicate their disputes in a neutral forum. The success of this doctrine in helping to eliminate industrial work stoppages depends upon whether courts are willing to assume the proper role necessary to satisfy the needs of aggrieved employees." Flynn & Higgins, *supra* note 26, at 1099.

[34] Many commentators have even suggested that the *Vaca* standard of review is too restrictive and should be expanded. See e.g. Clark, *supra* n. 30 at 1177-1178; Lewis, *supra* n. 28 at 123-126; Tobias, *supra* n. 21 at 86-91.

[35] *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

A. Petitioners Were Discharged for Alleged Dishonesty Which They Denied.

1. Discharge cases involve the maximum harm to individual employees.

The plight of the petitioners and the reasons why discharge is often referred to as "industrial capital punishment"[36] have been eloquently described by one recent commentator:

> "The consequences of discharge are bleak. A semi-skilled employee over 40 rarely can find a new job with comparable pay and benefits. It is difficult for an employee to pull up stakes and move to a new community where the job market may be more attractive. The discharged employee carries the stigma of his 'crime' forever. Employer references are not available, and he has more difficulty in getting a new job than an employee who has quit or has been laid off. Credit ratings may be adversely affected. Employee ego, self-confidence, and pride suffer lasting injury. Standing is diminished in the eyes of family and friends. Seniority, promotion, vacation, and pension rights and other fringe benefits dependent on length of service are lost.
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> "Discharge is a catastrophe for his family. Unemployment benefits often are unavailable. The family usually accumulates debts and faces hardship during the period of unemployment and the first years of reemployment at lower earnings on a new job."[37]

In short, there can be no greater harm suffered by an individual employee.

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[36] Azoff, *supra* n. 21 at 364.

[37] Tobias, *supra* n. 21 at 57-58.

2. Discharge grievances maximize the risks of collusion and unfair representation.

Discharge grievances involving factual disputes tend to involve less of the collective interest of the entire shop than do seniority or other grievances requiring contract interpretation. If the grievance is lost, the union feels the loss less because its relationship with the discharged employee is terminated. By reason of the termination of the relationship, the employee is deprived of the opportunity to exercise internal and political remedies within the union as protection against unfair representation.[38]

Moreover, discharge grievances present the opportunity for both employer and union to get rid of individual employees who are troublesome to both, such as petitioners in the instant case.[39]

This Court has acknowledged that the results of grievance proceedings should be viewed in a different light where circumstances indicate reason to suspect that "harmony of interest between the union and the individual employee cannot be presumed."[40]

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[38] Lewis, *supra* n. 28 at 124.

[39] As more fully set forth in the Statement of the Case, *supra*, at pp. 8-9, petitioners had constantly complained about the working conditions at Anchor's Lordstown Terminal and about the lack of representation provided by the Union in dealing with their complaints, all of which culminated in a wildcat strike during which some of the petitioners filed unfair labor practice charges against Anchor (R. 152-155) and published a notice warning the public of the operation by Anchor of unsafe equipment (R. 156). As a result of the strike, both Anchor and the Union were reluctantly compelled to renegotiate the local rider which each had refused to do previously (R. 156).

[40] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n. 19 (1974). Compare *Gateway Coal Co. v. United Mine Workers*, ———U.S.———, 94 S. Ct. 629 (1974), where the Court concluded that such a harmony of interest could more readily be presumed with respect to a safety dispute.

3. Judicial review of discharge grievances poses minimal risks of jeopardizing the "System of Industrial Self-Government" favored by "The Trilogy."

Wrongful discharge grievances, such as in the instant case, usually present only questions of fact and seldom involve far-reaching questions of contract interpretation affecting numerous other employees.[41] A judicial determination as to whether petitioners were or were not guilty of the dishonesty alleged would not set any contract precedent, would not impose any alteration in the legitimate relationship between the contracting parties, and would not require significant special expertise as to the conditions or common law of the shop.[42]

All of the foregoing considerations have led most commentators applying a balancing of interests analysis to conclude that judicial relief should be more readily available to employees in discharge cases.[43]

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[41] Lewis, *supra* n. 28 at 124; Simpson and Berwick, *supra* n. 28 at 1229-1230.

[42] Cf. *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960).

[43] See Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81, 123-126 (1967); Simpson and Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1229-1230 (1973); Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by his Union*, 41 U. CIN. L. REV. 55, 87 n. 83 (1972) and authorities cited therein.

B. Petitioners' Discharge Was Upheld by Joint Grievance Committee Proceedings Inherently More Susceptible to Corruption Than Traditional Arbitration and the Result Is Therefore Entitled to a Lesser Standard of Finality.

Petitioners' discharge was upheld by a Teamster joint grievance committee comprised of an equal number of employer and union representatives without any neutrals (R. 142).[41] The composition of such committees greatly magnifies the risk of collusion and "horsetrading."[45] As acknowledged even by one of its leading advocates:

> "The most criticized aspect of joint committees is the encouragement of 'horsetrading.' While 'horsetrading' exists in many union-management scenarios and to an extent even when traditional terminal grievance arbitration is available, the joint committee is structured so as to insure maximization and exploitation of opportunities for wheeling and dealing.
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> * * * * *
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> "In the constant *quid pro quo* of the committee system, there is always a suspicion that an employee is being sacrificed to appease an employer, to buy his good will for future negotiations or in return for past favors rendered." Azoff, *supra* n. 43 at 328-329.[46]

Although he argues that the strengths of the joint committee system make it preferable to arbitration for disputes requiring contract interpretation, modification, and renegotiation, Azoff concedes that discharge cases should perhaps be delegated to an arbitrator, *id.* at 364. Even the

[41] The "joint committee" system is fully described and evaluated in Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 TUL. L. REV. 325 (1973).

[45] Atleson, *Disciplinary Discharge—Arbitration and NLRB Deference*, 20 BUF. L. REV. 355, 369 (1971).

[46] For a firsthand account of the actual operation of the joint committee system, see E. JAMES & R. JAMES, HOFFA AND THE TEAMSTERS, 167-185 (1965).

leading advocate of attributing finality to arbitration results notwithstanding breaches of the duty of fair representation would not accord such treatment to decision of joint grievance committees, contending that they should be treated as "simply an agreement by the union that management did not violate the agreement."[47]

Although this Court has held that joint grievance committee decisions are enforceable as arbitration awards, *General Drivers Local 89 v. Riss & Co.*, 372 U.S. 517 (1963), it has also indicated that judicial relief will be more readily afforded from remedies "administered by the union, by the company, or both, to pass on claims by the very employees whose rights they have been charged with neglecting and betraying." *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330-331 (1969).

It is little wonder that the majority of reported §301 cases attacking grievance decisions arise in the trucking industry which utilizes the joint grievance committee procedure.[48] Where the impartiality of the decisionmaker is so questionable, a fair presentation of the grievance is critical, and the need for some residuum of meaningful judicial scrutiny is optimal.

C. There Is Overwhelming Evidence of Petitioners' Innocence of the Dishonesty for Which They Were Discharged.

The deposition testimony of motel owner Repicci and motel clerk Pagano overwhelmingly establishes petitioners' innocence and explains the evidence of apparent dishonesty for which they were discharged. Clerk Pagano

[47] Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 836-838 (1973); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1169 (1973).

[48] Tobias, *supra* n. 27 at 540.

testified that he handled all of the transactions in question (R. 51-53), that the amounts shown on the receipts accurately reflect what petitioners paid and that the discrepancy between the receipts and the registration cards is attributable to his having recorded a lesser amount on the registration card and pocketed the difference (R. 53-54) and that he committed perjury when he swore to the notarized statement obtained by Anchor (R. 55).

Owner Repicci testified that he personally handled none of the transactions in question (R. 65), that his brother-in-law Pagano had handled them, having authority to sign his name (R. 65), that he (Repicci) had no personal knowledge of the transactions (R. 158-159) and that his notarized statements (R. 188-189) had been based solely on comparison of the receipts with the registration cards and his brother-in-law's word (R. 66-67).

D. The Union's Breach of Its Duty of Fair Representation Was Flagrant and Highly Prejudicial.

The evidence establishes that the Union's conduct in handling petitioners' grievance was at best arbitrary and irrational, and in all probability was in "bad faith" out of hostile motives toward petitioners and "friendly" motives toward the Company.

Union officials affirmatively misled petitioners into desisting from gathering their own exculpatory evidence, by advising them that there was no need for petitioners to investigate or do anything (R.40-41, 73-74), that they should forget it (R. 49), do nothing (R. 49), and let business agent Angelo take care of it (R. 46, 79). This advice was coupled with assurances of certain success in retaining their jobs (R. 46, 79-80). The evidence discloses no conceivable rational basis for either the advice or the assurances. Indeed, the respondents have never even hy-

pothesized a conceivable rational basis for this conduct by the union.

If the union had advised petitioners that the Company's evidence against them was so compelling as to render petitioners' grievance futile, absent substantial countervailing evidence of innocence, and that union resources could not be devoted to processing futile grievances, there would have been a rational basis for such a position. Moreover, it would have apprised petitioners that it was their burden to investigate and to gather evidence of innocence in order to persuade the union to process the grievance. However, the union did not adopt this rational stance.

If the union had advised petitioners that, while it would process their grievance, it lacked the resources to investigate or gather evidence of innocence and that petitioners must assume the burden of doing so, there would have been a rational basis for such a position and it would have afforded petitioners the opportunity to gather exculpatory evidence.

If the union had merely failed to investigate and to advise petitioners of the necessity or desirability of their doing so in their own behalf, these omissions may have constituted negligent but not necessarily irrational conduct. However, the union did not even assume this nonfeasant posture.

While there is no conceivable benevolent explanation for the union's apparently irrational conduct toward petitioners, there is one conceivable rational explanation for the conduct, to wit: hostile motives toward petitioners. There is substantial evidence of a history of hostility between petitioners and union officials and of a sweetheart relationship between those officials and the Company. See Statement of the Case, *supra* at pp. 8-9.

By reason of the union's misconduct petitioners were deprived of the opportunity to present the only evidence which could have established their innocence—the testimony of motel owner Repicci and motel clerk Pagano. The ensuing judgment of guilt by the grievance committee is thus demonstrably unreliable as a direct result of the union's breach of its duty of fair representation.

CONCLUSION

The central issue in this case is whether the eight petitioners, whose livelihoods have been jeoparized and whose good names have been ruined by demonstrably false charges of dishonesty, are to be permanently deprived of their jobs and their honor because they were given the form without the substance of a grievance hearing. Neither elemental principles of justice nor national labor policy should permit such a result.

Accordingly, petitioners pray that this Court reverse the judgment of the Sixth Circuit affirming the district court's summary judgment in favor of respondent Anchor Motor Freight and remand the case for a trial, in which they will have the opportunity to vindicate their good names and end the years of grief and economic ruin which have plagued them since their discharge for alleged dishonesty of which they were not guilty.

Respectfully submitted,

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